

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
WILLIAM SAVINO	:	DETERMINATION
D/B/A WILLY'S SERVICE STATION	:	
	:	
for Revision of Determinations or for Refunds	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period August 1, 1965	:	
through November 30, 1983.	:	

Petitioner, William Savino d/b/a Willy's Service Station, 1014 Flushing Avenue, Brooklyn, New York 11237, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period August 1, 1965 through November 30, 1983 (File No. 802090).

A hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 18, 1987 at 1:15 P.M. Petitioner appeared by Norman F. Russakoff, Esq. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

- I. Whether petitioner timely applied for a hearing.
- II. Whether the Audit Division properly determined petitioner's sales tax liability on the basis of external indices.

FINDINGS OF FACT

1. Petitioner, William Savino d/b/a Willy's Service Station, operated a gasoline service and repair station located at 1014 Flushing Avenue, Brooklyn, New York during the period in issue.
2. On April 11, 1984, the Audit Division issued to petitioner the following notices of determination and demands for payment of sales and use taxes due:

<u>Period</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
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August 1, 1965 - November 30, 1968	\$32,008.65	\$16,004.26	\$70,451.97	\$118,464.88
December 1, 1968 - May 31, 1971	28,327.67	14,163.83	51,605.46	94,096.96
June 1, 1971 - August 31, 1974	44,011.91	22,005.89	63,883.62	129,901.42
September 1, 1974 - February 28, 1978	53,774.56	26,887.28	54,241.36	134,903.20
March 1, 1978 - August 31, 1981	53,774.56	26,887.28	29,858.49	110,520.33
September 1, 1981 - November 30, 1983	31,288.28	15,644.12	5,701.35	52,633.75

The amount of tax due on the foregoing notices was estimated due to petitioner's failure to produce books and records for audit. The records of the Department of Taxation and Finance did not indicate that petitioner was a registered vendor for sales tax purposes nor was there any record of the filing by petitioner of any sales tax returns. As a result, the Audit Division assessed petitioner for all periods back to the inception of the Sales Tax Law. Counsel for the Audit Division conceded that the burden of proving fraud could not be met and alternatively argued that penalty should be imposed under the provisions of section 1145(a)(1) of the Tax Law.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1980 through February 28, 1982 to May 30, 1984.

4. In the absence of books and records, the Audit Division estimated gasoline sales from information obtained from petitioner's supplier of gasoline. The supplier's records showed that petitioner purchased 8,458 gallons of gasoline during the period December 1, 1980 through February 28, 1981. Gasoline sales of \$10,572.00 were estimated for this period by applying an average retail selling price of \$1.25 (excluding State gasoline tax and sales tax) to the gallonage. Repair sales were also estimated due to the lack of records. The Audit Division determined sales of \$37,440.00 for the above period based on prior audit experience (\$30.00 per hour x two mechanics x 8 hours per day x 6 days per week x 13 weeks per quarter). The combined taxable

sales for the period amounted to \$48,013.00. This amount was considered sold in each of the sales tax reporting periods through August 31, 1982. For the periods September 1, 1982 through November 30, 1983, only the repair sales were used in determining the taxes due.¹

5. Petitioner did not receive the notices until April 17, 1984. The Audit Division did not submit a mailing record of certified mail for April 11, 1984, certified mail receipts, or other evidence to establish mailing of the notices of determination on April 11, 1984. The Tax Appeals Bureau received five petitions with respect to the notices referred to above on July 16, 1984. The envelope containing the petitions was postmarked July 13, 1984. Petitioner produced the envelopes in which the notices were mailed. One was postmarked April 11, 1984 and the other two envelopes had metered mail stamps dated April 11, 1984 with no United States postmark.

6. Petitioner submitted notices and demands for payment of sales and use taxes due (ST-561A) which indicated sales tax returns were filed by petitioner under ID number 11-1549799 for the quarterly periods ending August 31, 1973, August 31, 1974, November 30, 1974, February 28, 1975, May 31, 1975, August 31, 1975 and November 30, 1975.

7. Petitioner submitted six cancelled checks dated May 28, 1977, August 17, 1977, October 5, 1977, January 30, 1980 and September 10, 1983, all of which were payable to New York State Sales Tax Bureau. The checks amounted to \$563.19.

8. Petitioner submitted cancelled checks and a listing thereof which purported to represent all gasoline purchases from January 1977 through April 1981. The checks totalled \$23,240.01.

CONCLUSIONS OF LAW

A. That Tax Law § 1138(a)(1) provides, in pertinent part, that a notice of determination of tax due shall be given to the person liable for the collection or payment of the tax and such determination shall finally and irrevocably fix the tax unless the person against whom it is

¹Effective September 1, 1982, the retailer of gasoline no longer collected the sales tax (L 1982, ch 454, 469).

assessed, within ninety days after giving of notice of such determination shall apply to the Tax Commission for a hearing, or unless the Tax Commission of its own motion shall redetermine the same.

B. That Tax Law § 1147(a)(1) provides that any notice required under the provisions of Articles 28 and 29 may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed or application made. A notice of determination shall be mailed promptly by registered or certified mail and any period of time which is determined according to the provisions of Article 28 by the giving of notice shall commence to run from the date of mailing of such notice. The mailing of such notice shall be presumptive evidence of receipt by the person to whom it is addressed.

Subsection (2) provides that if any return, claim, statement, application, or other document required to be filed within a prescribed period under Article 28 is delivered after such period, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery.

C. That the Audit Division submitted no evidence of mailing the notices at issue herein by registered or certified mail on April 11, 1984. Since the Audit Division did not establish registered or certified mailing, the ninety day period for filing a petition will commence to run as of the date of receipt (Matter of AAA Sign Company, State Tax Commission, December 31, 1984). Petitioner received the notice on April 17, 1984 and filed a petition for a hearing with respect thereto within ninety days of actual receipt. Accordingly, petitioner is entitled to a hearing on the merits of the case.

D. That Tax Law § 1138(a) provides that "if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the Tax Commission from such information as may be available" and authorizes, where necessary, an estimate of tax due "on the basis of external indices".

E. That Tax Law § 1135(a) provides that every person required to collect tax shall keep

records of every sale and all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

F. That petitioner did not have books and records available for audit. When records are not provided or are incomplete and insufficient, it is the duty of the Audit Division to select a method of audit reasonably calculated to reflect taxes due (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 AD2d 576). The Audit Division properly determined petitioner's sales of gasoline and repairs on the basis of purchases and the auditor's experience with audits of similar businesses in accordance with Tax Law § 1138(a) and petitioner had the burden of establishing that the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 AD2d 858). The checks for gasoline purchases submitted, without additional corroboration, do not serve to prove that these were the total purchases for the period. However, the Audit Division's use of \$1.25 per gallon for gasoline and \$30.00 per hour for repair sales for periods as much as 17 years prior to the test period did not reasonably calculate the taxes due. Accordingly, the taxes assessed for periods August 1, 1965 through November 30, 1973 are cancelled. (Ristorante Puglia Ltd. v. Chu, 102 AD2d 348).

G. That Tax Law § 1147(b) provides, in pertinent part, that:

"except in the case of a willfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of filing a return; provided, however, that where no return has been filed...the tax may be assessed at any time."

The Audit Division's assessment of additional taxes due for the periods set forth in Finding of Fact "6" were barred by the statute of limitations in Tax Law § 1147(b). Moreover, petitioner shall be given credit for the tax payments indicated in Finding of Fact "7". Petitioner otherwise failed to sustain his burden of showing error.

H. That the fraud penalty is cancelled in accordance with the concession of the Audit

Division (Finding of Fact "5"). However, petitioner was negligent in its failure to file sales tax returns and pay over the taxes when due. Therefore, penalty and interest shall be imposed under the provisions of Tax Law § 1145(a)(1) for those periods after November 30, 1973 for which no returns were filed thus allowing assessment at any time under Tax Law § 1147(b). For those periods for which returns were filed (Finding of Fact "6"), the Audit Division was barred from asserting the penalty under Tax Law § 1145(a)(1) since the hearing date was beyond the period of limitation for assessment.

I. That the petitions of William Savino d/b/a Willy's Service Station are granted to the extent indicated in Conclusions of Law "F", "G" and "H"; the Audit Division is hereby directed to modify the notices of determination and demands for payment of sales and use taxes due issued April 11, 1984; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

ADMINISTRATIVE LAW JUDGE